Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 94-10
	)	
THE LUTHERAN CHURCH/ MISSOURI SYNOD	)	File Nos. BR-890929VC BRH-890929VB
	)	
For Renewal of Licenses of Stations KFUO/KFUO-FM Clayton, Missouri	)	

To: Administrative Law Judge
Arthur I. Steinberg

MASS MEDIA BUREAU'S REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On September 6, 1994, The Lutheran Church/Missouri Synod ("the Church") and The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP (collectively "the NAACP") filed Proposed Findings of Fact and Conclusions of Law ("PFCs") in the above-captioned proceeding. The Mass Media Bureau hereby replies to the Church's PFCs[1]. Our failure to reply to any particular finding or conclusion contained in the PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its own proposed findings of fact are an accurate and complete presentation of the relevant record

[1] We do not specifically reply to the NAACP's PFCs because the ultimate conclusion therein is the same as that proposed by the Bureau. Thus, any disagreement that we may have with the manner in which that conclusion is reached is of no consequence.

evidence and that its conclusions of law properly apply Commission precedent in light of the record.

2. At the outset, the Church argues for what is no less than an absolute exemption from the Commission's Equal Employment Opportunity ("EEO") requirements on account of the Church's status as a religious institution, citing the First Amendment of the U.S. Constitution. This type of constitutional argument has been made, and rejected, before. See, e.g., Faith Center, Inc., 82 FCC 2d 1, 17-21 (1980). Like the licensee in Faith Center, the Church "has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums." 82 FCC 2d at 20. Thus the Church "subjects itself to public interest obligations." Id. The Church states, at p. 78 of its PFCs, that it does not contest the principle that "like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations'." King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974), quoting Office of Communication of United Church v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Rather, according to the Church, the Church is only questioning whether "the degree of accommodation of a licensee's religious rights" delineated in King's Garden is "legally sufficient." The Church argues that it is not, but it does not set forth the "degree of accommodation" which it considers appropriate. Instead, the Church believes that its own "judgement as to which employment positions require

religious knowledge, training or expertise may not be subjected to second-guessing by a government agency." PFCs Pp. 88-89.

3. We submit that the Church's view is insupportable. As in Faith Center, adoption of this interpretation "would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees existed." 82 FCC 2d at 21. As the Commission also pointed out in Faith Center, referencing Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970), "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture." Id.

4. Most importantly, the appropriate accommodation between the Church's public obligations as a licensee and its religious rights under the First Amendment was specifically set forth in King's Garden. There, the Court of Appeals determined that the Commission's exemption from EEO requirements only for employment connected with espousal of a licensee's religious views does not violate the licensee's First Amendment rights. In so doing, the court pointed out that a religious sect "confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license." 498 F.2d at 60. "A religious sect has no constitutional right to convert a licensed communications franchise into a church." Id. Thus,

"[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression." 498 F.2d at 61.

5. The Church attacks the case-by-case analysis in which the Commission must sometimes engage in order to apply the exemption authorized in King's Garden. However, as the court observed in King's Garden:

> The Commission has set itself the difficult task of drawing lines between the secular and religious aspects of the broadcasting operations of its sectarian licensees. Though this is a delicate undertaking, it is one which the First Amendment thrusts upon every public body which has dealings with religious organizations.

498 F.2d at 61. Citations omitted.

6. We submit that the Commission is bound by King's Garden, which is still good law. Nevertheless, the Church insists, at p. 83, et seq., that the premise of King's Garden has been "shattered" by Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). We disagree. Amos did not overrule King's Garden. Amos held that the blanket exemption for religious institutions in Title VII of the Civil Rights Act is constitutional as applied to a non-profit organization. Neither the Communications Act nor the Comission's Rules contain such an exemption, and the

Commission and the courts have consistently distinguished the Commission's EEO requirements from those of Title VII. See, e.g., Florida State Conference of Branches of the NAACP v. FCC, No. 93-1162, slip op. (D.C. Cir. May 27, 1994); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978).

7. The Church focuses on dicta in King's Garden which opined that the Title VII exemption was unconstitutional. The majority's analysis was not based on this premise, however. Instead, King's Garden went on to hold that the Title VII exemption is not relevant to the Commission's EEO requirements. 498 F.2d at 58. It was for this very reason that Judge Bazelon did not join in the opinion. His concurrence is based on his view that the Title VII exemption is applicable, but unconstitutional. 498 F.2d at 61. Had the majority opinion been based on the unconstitutionality of the Title VII exemption, Judge Bazelon would have joined it, rather than concurred in it.

8. In this regard, the Church asks that "any standards established in this proceeding" be applied to the Church prospectively. However, this proceeding does not establish any new standards. The standards to be applied are those clearly set forth in King's Garden; i.e., that only employment connected with the espousal of religious views is exempt from the Commission's EEO requirements. To the extent that the Church ignored that

distinction, it did so at its own peril. Indeed, by letter dated April 4, 1989, its counsel correctly and precisely explained the exemption to the Church. The letter, which, appropriately, failed to mention Amos, accurately concludes:

> In sum, while a religious affiliation requirement may be permissible in certain circumstances, it is clear that the FCC and the courts are likely to restrict such limitations to very narrow situations where the employee is directly connected with the production of programming which espouses a religious viewpoint.

Church Ex. 8, Att. 6.

9. The Church also argues that it should not be judged by "new standards" for EEO compliance allegedly adopted since the early part of the Church's license term. Once again, the Church is not specific regarding what "standards" it believes have changed and how the change affects the Church's compliance. If the Church is arguing that it once had the freedom "to craft [its] own approach to affirmative action" so as to permit it to ignore the Commission's affirmative action requirements, it is mistaken. As the Commission observed in Equal Opportunity Rules for Broadcasters, 2 FCC Rcd 3967 (1987), which the Church cited as one of the alleged changes, "[i]n deciding to include specific EEO requirements in our broadcast rules, it is our intention not to alter the broadcasters' current EEO obligations ...." 2 FCC Rcd at 3969. Nor do the changing of processing guidelines and similar administrative tools relied upon in the Church's PFCs have the effect of changing basic EEO requirements.

10. Well before the beginning of the license term, it was clear that the Commission's EEO requirements "embody two concepts; nondiscrimination and affirmative action." Nondiscrimination in Employment Practices (Broadcast), 60 FCC 2d 226, 231 (1976). Moreover, the Commission's affirmative action policy called for a positive and continuing plan to "'ensur[e] an active recruitment program and genuine equal employment opportunity ....'" Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 n. 24 (D.C. Cir. 1978), quoting National Broadcasting Co., 58 FCC 2d 419, 422 (1976). It is simply not apparent to the Bureau under what theory the Church's total failure to have an affirmative action program could have ever been considered acceptable. Here, attempts to correct the Church's noncompliance as a prospective matter by, for instance, the imposition of reporting conditions and/or forfeitures, as sanctioned, e.g., in Florida State Conference and Bilingual, are out of the question. As the Bureau pointed out in its own PFCs, the instant derelictions are intertwined with misrepresentation and lack of candor.

11. The Church assumes that the Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture in this proceeding, 9 FCC Rcd 914 (1994) ("HDO"), relied upon Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) ("Standards"). The Church then launches into an attack on Standards. However, there is no

indication that the HDO relied on Standards. The HDO does not cite Standards, and the fact that both were released on the same day suggests the contrary. In any event, it is not clear how Standards changed the Church's EEO obligations in any relevant way.

12. The Church claims that no evidence of an intent to deceive has been shown in the instant case. We submit, as we did in our PFCs, that intent is a factual question which can be found where, as here, the evidence points to a reasonable inference. See California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985). Intent can be found from a showing of motive or "logical reason or desire to deceive." Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1100 (Rev. Bd. 1982). Here, the Church was clearly attempting to conceal its EEO failings from the Commission in order to obtain renewal of its license. Moreover, it is preposterous to suppose that the Commission should have known about the Church's self-imposed limitations in hiring merely because the Church stated that it recruited for "qualified" minority and female applicants, or because the Commission knew the Church to be a religious institution, or because the Commission knew that the Church had some connection with Concordia Seminary. This reasoning is rejected in our PFCs, at p. 58, as it must be.

13. The Church attempts to minimize its misrepresentation

that certain positions required classical music knowledge by insisting that such a background was a desirable trait. However, the only way for the Church to persuade the Commission that the "requirement" affected its recruitment was to represent, falsely, as it happened, that there was an absolute requirement. A "desirable trait" would not have had a limiting effect upon the Church's recruitment efforts, because it would not necessarily have reduced the size of the labor force from which the Church could hire.

14. In short, for the reasons fully set forth in the Bureau's PFCs, we submit that the Church is not qualified to remain the licensee of KFUO and KFUO-FM.

Respectfully submitted,
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CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 31st day of October, 1994, sent by regular United States mail copies of the foregoing **"Mass Media Bureau's Reply to Proposed Findings of Fact and Conclusions of Law"** to:

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